

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

IP-Enabled Services

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WC Docket No. 04-36

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

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May 28, 2004

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The American Public Communications Council ("APCC") hereby submits comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), FCC 04-28, released March 10, 2004. In the NPRM, the Commission requests comment on appropriate treatment of Internet Protocol ("IP") enabled services in FCC regulations.

STATEMENT OF INTEREST

APCC is a national trade association representing some 1,000 companies that operate public pay telephones. Founded in 1988, APCC actively participated in every major FCC proceeding affecting payphones.

DISCUSSION

I. THE COMMISSION MUST ENSURE THAT PAYPHONE SERVICE PROVIDERS ARE FAIRLY COMPENSATED FOR THE USE OF PAYPHONES TO ORIGINATE IP-ENABLED COMMUNICATIONS

The questions raised by the NPRM regarding regulatory classification of IP-enabled services have serious implications for the federal policy of promoting “widespread deployment of payphone service.” 47 U.S.C. § 276(b). Specifically, consumers’ ability to access IP services from payphones raises the question of how payphone service providers (“PSPs”) will be “fairly compensated for each and every . . . call” that uses a payphone to access IP-enabled services. 47 U.S.C. § 276(b)(1)(A).

There can be little doubt that the “calls” for which Congress has mandated that PSPs be “fairly compensated” include “calls” made to access IP-enabled services. APCC is not aware of any precedent for an interpretation that would exclude communications made to access IP-enabled services from the definition of a “call.” To remove any doubt, however, the Commission must clarify that Section 276 mandates PSPs be fairly compensated for all communications using their payphones (except those specifically exempted by statute), including communications made for purposes of accessing IP-enabled services.

Such an interpretation of Section 276 is necessary to implement the policies of Section 276. As consumers increasingly use traditional payphones to access IP-enabled services that substitute for traditional circuit-switched voice services, fair compensation for providing access to such services is becoming critical to maintaining the widespread deployment of traditional payphone service mandated by Section 276.

Moreover, it is clearly in the public interest for the Commission to adopt policies that promote public access to IP-enabled services. By offering access to IP-enabled services from traditional payphones and by investing in new types of public access terminals, PSPs are enhancing consumers' opportunities to transmit voice, data, and integrated voice and data to and from public locations. Promoting such enhanced uses of payphone service, however, requires the Commission to ensure that PSPs are "fairly compensated" for providing such access both from traditional payphones and advanced terminal equipment.

A. The Commission Must Revise Or Clarify Its Payphone Compensation Rule To Ensure That The Appropriate Entity Compensates PSPs For IP-Enabled Communications

As consumers increasingly use payphones to access IP-enabled services, the Commission must ensure that the regulatory classification of IP-enabled services and service providers does not hinder PSPs' from obtaining fair compensation for the use of payphones to access such services.

1. The Commission must clearly identify the "Completing Carrier" for an IP-enabled service for purposes of the payphone compensation rule

If the Commission determines that some or all IP-enabled services accessible from payphones are not "telecommunications services," or that some or all providers of such IP-enabled services are not "carriers," then the Commission must address the impact of that decision on PSPs' ability to collect compensation from appropriate parties for IP-enabled communications.

The current payphone compensation rule therefore identifies the “Completing Carrier” as the entity responsible for paying compensation to PSPs for access code and subscriber toll-free calls originating from payphones. In the case of IP-enabled services, this rule does not necessarily identify the party that should compensate the PSP for the call – or arguably could fail to identify *any* party as responsible for paying compensation for the call. The rule assumes that calls are “completed” by “carriers,” but the term “completed” is not defined in detail. If IP-enabled calls are “completed” by IP service providers who are not classified as “carriers,” then it could be argued that there is no entity responsible for the call. The IP service provider would claim not to be responsible because it is not a “carrier,” and any actual carrier located further “upstream” would claim not to be responsible because it did not “complete” the call. Accordingly, the Commission must consider whether it is necessary to amend its compensation rule to make clear which entity is responsible to pay for an IP-enabled call.

Assigning compensation responsibility for IP-enabled calls is further complicated by the fact that the Communications Act does not necessarily provide an effective means for PSPs to bring proceedings to collect compensation from entities who fail to pay compensation when due if those entities are not “carriers.” When PSPs bring such proceedings today, they generally proceed under Sections 206-208 of the Act, which authorizes any person to bring an action against a “carrier” for violation of the Act. 47 U.S.C. §§ 206-08. While there may be alternative provisions of federal law under which PSPs could sue non-carriers, the courts have not clearly ruled that such provisions are available. Further, some courts have found that Section 276 itself does not give rise to any cause of action to collect compensation from non-paying entities. *See e.g., Greene v.*

Sprint Comms. Co., 340 F.3d 1047 (9th Cir. 2003). As a result, PSPs have sued carriers to collect compensation based on the Commission's determination that a carrier who fails to pay compensation when due has committed an unreasonable practice violating Section 201(b) of the Act. 47 U.S.C. § 201(b); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, ¶ 32 (2003). This alternative, however, presumably would not be available against an entity that is not a "carrier." In summary, there is a question whether the Commission can effectively ensure that PSPs are fairly compensated for payphone calls that access IP-enabled services if it places compensation payment responsibility on IP service providers that are not classified as carriers.

There are at least two alternatives to this dilemma that require consideration. First, the Commission could exercise its Title I responsibility to place compensation liability on the "completing IP-enabled service provider," even though that provider is not a "carrier." There is substantial precedent for the Commission to exercise Title I authority to reach non-carriers where necessary to carry out statutory policies. If the Commission adopts this alternative, it must ensure that PSPs can enforce their compensation rights. For example, the Commission could determine that, in accepting calls originating from payphones, IP-enabled service providers render themselves amenable to court or Commission proceedings as if they were "carriers."

Or the Commission could determine that, if a call is completed by an IP-enabled service provider that is not a "carrier," then the last carrier to handle a call prior to its completion by the IP-enabled service provider is responsible for paying compensation. While this approach may raise questions concerning that carrier's ability to determine if the call is "completed," it has the great advantage of fixing responsibility on an entity

that is clearly amenable to legal proceedings if necessary to enforce the PSP's right to compensation.

In any event, the Commission needs to consider carefully the implications for payphone compensation of classifying IP-enabled service providers as "non-carriers." If it does so classify some or all IP-enabled service providers, then the Commission must promptly amend its compensation rule to ensure that PSPs can collect payphone compensation from the appropriate entity.

2. The Commission must clarify that call-processing devices used by IP-enabled service providers are "switches" for purposes of the payphone compensation rule

A related issue concerns whether an IP-enabled service provider "owns or leases" a "switch" for purposes of the payphone compensation rule. The rule requires that:

Except as provided herein, a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.

47 CFR § 64.1300(b). A question could be raised whether the devices used by IP-enabled service providers to complete IP-enabled communications fit the definition of "switch." If the Commission places compensation responsibility on IP-enabled service providers, then it must revise or clarify the rule to ensure that that devices that such service providers use are "switches" for purposes of the rule.

B. The Commission Must Revise Or Clarify Its Rules To Require IP-Enabled Service Providers To Transmit And Process Appropriate Information To Identify Payphone Calls For Purposes Of Payphone Compensation

Regardless of how the Commission assigns responsibility for payment of payphone compensation, the Commission must make clear that carriers and service providers have a duty to ensure that the use of IP services does not disrupt the transmission and use of payphone identifiers to “tag” calls for purposes of payphone compensation. The payphone compensation rule places responsibility on the entity with the payment obligation, currently the “Completing Carrier,” to “establish a call tracking system that accurately tracks coinless access code or subscriber toll-free payphone calls to completion,” and compensate the PSP for each “tracked” call. 47 CFR § 1310(a)(1). Currently, carriers use the “ANI” information transmitted with a call, in combination with “ANI information digits” that precede the ANI information, to identify calls originating from payphones and the particular payphones from which they originate. Payphone lines of the kind traditionally used by local exchange carriers (“LECs”) to connect their own payphones to the network have “hard-coded” ANI information digits (“27”) that uniquely identify payphone lines. The payphone lines typically used by non-LEC PSPs, however, do not have unique “hard-coded” ANI information digits. To identify calls originating from these payphones, the IXC that receives the call from the originating LEC must subscribe to a LEC access service known as “FLEX ANI.” This service provides “software-defined” ANI information digits that are set up differently from hard-coded ANI digits. *See generally Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order, 13 FCC Rcd 4998 (Com. Car. Bur. 1998).*

When IP services are used in the transmission of a call, however, there is potential for the ANI and/or the ANI information digits to be “stripped off” as a result of the change in protocol. For example, consider the following scenarios.

Scenario #1. A payphone caller in Los Angeles dials a toll-free number to access a switch-based reseller’s call processing “platform” in New York for purposes of placing a call using a prepaid calling card. When the call reaches the Los Angeles POP of the facilities-based interexchange carrier (“IXC”) providing toll-free service to the reseller, the IXC converts the call to IP for the trip across the country. When the call is converted to IP, however, the ANI is “stripped off.” The reseller does not object to the absence of ANI because the reseller has a “postalized” rate structure and does not need to know where the call originated in order to bill the end user. Because the reseller does not know the number of the phone from which the call originated or that the call originated from a payphone, the reseller does not pay compensation for the call.

Scenario #2. Same as Scenario #1, except that the IXC preserves the ANI information, but not the ANI information digits, when it converts the call to IP. As a result, the reseller knows the number from which the call originated, but does not know that the call originating from a payphone, and does not pay compensation for the call.

Scenario #3. Same as Scenario #2, except that the IXC preserves both the ANI information and the ANI information digits when it converts the call to IP. The reseller, however, is unfamiliar with the industry standard for expressing the ANI information digits in IP, and does not recognize the ANI information digits in the IP information packets. As a result, the reseller does not recognize that the call originated from a payphone, and does not pay compensation for the call.

A variety of other scenarios could be constructed. The point is that, when IP is used during transmission of a call, it cannot be presumed that payphone-identifying information that is present when the call is originated in circuit-switched format will still be present and will be recognized when the call is completed.

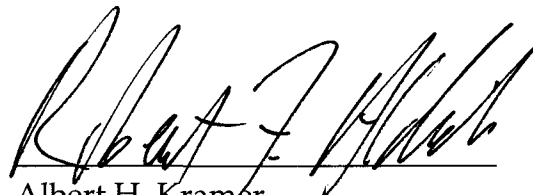
A number of industry groups are currently working on standards to ensure that ANI information is preserved when calls are converted to IP; however, APCC is not

aware of any standards work that is focused on the preservation of FLEX ANI-based payphone-identifying ANI information digits when calls are converted to IP.

To ensure that calls using IP-enabled services continue to be identifiable as payphone calls, therefore, the Commission must clarify that each carrier or service provider in the "chain" of carriers and service providers that handle an IP-enabled call is responsible for maintaining the integrity of the payphone-identifying ANI digits and for recognizing such digits when they appear in IP as well as circuit-switched protocols. Further, the Commission should inquire of standards bodies whether they are addressing the preservation of ANI information digits and FLEX ANI in IP conversions, and should request progress reports from standards bodies on the development of such standards.

Dated: May 28, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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